

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal No. 07-CR-0178-L
Plaintiff,)
v.) **ORDER FOLLOWING TRIAL**
CHO-ING TSENG,)
Defendant.)
_____)

I. INTRODUCTION

On January 26, 2007, a federal grand jury indicted Defendant Cho-Ing Tseng (“Defendant” or “Tseng”) on five counts of wire fraud, in violation of 18 U.S.C. §1343. On February 5, 2007, Defendant was arraigned on the indictment and entered a plea of not guilty. Defendant’s first trial resulted in a mistrial on May 29, 2007, after the jury indicated that it was unable to reach a verdict. Defendant’s second jury trial began October 2, 2007. At the close of the Government’s case-in-chief, Tseng moved for a judgment of acquittal, pursuant to Rule 29. Additionally, Defendant moved for mistrial due to the introduction of testimony by Venezuelan law enforcement agents and again during the cross examination of the Defendant.

II. FACTS

The Government alleges that beginning early December 2006 through early January 2007, Tseng and his accomplice, Elena Lee (“Lee”), engaged in a false kidnaping scheme by faking the Defendant’s abduction in Venezuela. Defendant and Lee allegedly sought a fraudulent ransom payment from Tseng’s family members within the United States in order to secure Tseng’s theoretical release. During that time, Defendant and Lee made numerous phone calls to Tseng’s wife and children and left several voice messages on the home answering machine. Defendant and Lee both contacted Tseng’s wife and children individually. Lee conveyed that she was the “go between” and could assist in Defendant’s release from captivity. The content of these phone calls led Tseng’s wife and children to believe that Defendant had been kidnaped by business clients defrauded by Tseng’s business partner Estefano Renzo Alvarado. According to Defendant and Lee, the clients wanted their money back and would kill Defendant if the ransom was not paid. Defendant and Lee both asked Tseng’s wife and children not to go to the police.

Believing that Defendant's life was in danger, however, his wife and children contacted the United States Embassy in Caracas, Venezuela on December 28, 2006. Shortly thereafter, the Federal Bureau of Investigation ("FBI") became involved, as did the Venezuelan law enforcement agency *Cuerpo de Investigaciones Cientificas, Penales y Criminalisticas* ("CICPC"), Kidnaping and Extortion Division. CICPC Officer Flor Cordero ("Officer Cordero" or "CICPC Officer Cordero") summoned Lee to appear at the local prosecutor's office for questioning regarding the alleged kidnaping. Lee indicated to Officer Cordero that she had no knowledge of the alleged kidnaping, that Defendant had not been kidnaped, and that Defendant had accompanied her to the building to prove that he was alive and well.

Soon after speaking to Lee, Officer Cordero met with Defendant. Officer Cordero informed Defendant about the kidnaping report filed by his family with the U.S. Embassy in Venezuela, along with the FBI's involvement in the matter. Defendant maintained that he had not been kidnaped, although he offered no clarification or explanation at that time. During a later investigation, Defendant provided a signed handwritten statement to the federal authorities

admitting that he made duplicitous phone calls to his wife and children, which erroneously caused them to believe he had been kidnaped. Defendant also admitted to Lee's participation in the kidnaping scheme.

III. DISCUSSION

A. Rule 29 Motion

Rule 29(a) requires a court to enter a judgment of acquittal “if the evidence is insufficient to sustain a conviction.” Fed.R.Crim.P. 29(a). In considering a Rule 29 motion, the Court “must determine whether, viewing the evidence in the light most favorable to the government, the jury could reasonably find the defendant guilty beyond a reasonable doubt.” *United States v. Merriweather*, 777 F.2d 503, 507 (9th Cir. 1985) (internal quotation and citation omitted). At the close of the Government’s case-in-chief, Defendant moved for a judgment of acquittal, pursuant to Rule 29. The trial court may, as the Court did in this case, reserve decision on a Rule 29(a) motion. Fed.R.Crim.P. 29(b). If the Court does reserve decision, the Court must decide the motion on the basis of the evidence presented to the jury at the time the ruling was reserved. *Id.* Now, viewing “the evidence [as it was] at the time the ruling was reserved,” *Id.*, the Court **DENIES** Defendant’s motion for acquittal.

Defendant maintains that the Government failed to present independent evidence of the Defendant’s intent to defraud, and instead relied exclusively on the Defendant’s statement’s to the authorities as evidentiary support in violation of the traditional *corpus delicti* rule. In *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954), the Supreme Court reaffirmed the traditional *corpus delicti* rule whereby a defendant may not be convicted based solely on his own admissions. The Ninth Circuit has since interpreted *Opper* to impose a “two-pronged” corroboration requirement. See e.g., *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992). While the Government need not introduce independent evidence of the *corpus delicti* in conformance with the traditional test, “it must introduce sufficient evidence to establish that the criminal conduct at the core of the offense has occurred.” *Id.* at 592. Additionally, the Government “must introduce independent evidence tending to establish the trustworthiness of

1 the admissions, unless the confession is, by virtue of special circumstances, inherently reliable."

2 *Id.*

3 Independent evidence of the Defendant's intent to defraud was properly presented at trial.
4 For instance, the following testimony was elicited during the direct examination of Defendant's
5 wife, Anita Tseng:

6 Q: I am taking about on January 13th. Did Elena give you any advice on what you
should tell the authorities if questioned about what happened[?]

7 A: She didn't give me advice. She only told me that over there my husband was
8 not kidnapped. She wanted us to understand what our understanding was[,] was
not what really happened there.

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10 Additional independent evidence introduced during the trial included: (1) testimony that
11 deadlines for ransom payments passed without consequence; (2) testimony that ransom demands
12 came solely from Defendant and Lee, as opposed to directly from the purported kidnapers;
13 (3) testimony regarding the changing ransom amounts; (4) testimony that Defendant answered
14 his own cell phone without interference from his "captors" on repeated occasion; (5) testimony
15 that Defendant called his wife on January 5, 2007, and berated her for contacting the authorities,
16 moments after a heated phone conversation took place between Lee and Defendant's wife who
17 urged Lee to contact the police; and (6) testimony that Defendant was allowed to leave without
18 the ransom demands being met.

19 Upon consideration of this corroborating evidence, the Court is satisfied that the
20 Government's case did not exclusively rely on Defendant's confession. There is sufficient
21 independent evidence establishing that the criminal conduct occurred at the core of the offense,
22 Defendant's Rule 29 motion is therefore **DENIED**.

23
24 B. Motion for Mistrial

25 During the trial, Defendant also moved for mistrial on the grounds of prosecutorial
26 misconduct due to the introduction of testimony by Venezuelan law enforcement agents, CICPC
27 Officers Flor Cordero and Nancy Albarracin-Gomez. Defendant argues *inter alia* that the
28 Government violated the Jencks Act, as well as its discovery obligations, by not providing

1 Defendant with Venezuelan police reports associated with the officers' testimony; and this
 2 violation should have prevented the officers' testimony in its entirety. However, the
 3 documentation Defendant sought, if it even existed, remained in the exclusive possession of the
 4 Venezuelan government by and through its law enforcement agents, Officers Cordero and
 5 Albarracin-Gomez. Defendant also objects to the introduction of related testimony pertaining to
 6 certain cell phone records discovered during the investigation on the grounds of hearsay.

7 1. Jencks Act Material

8 The Jencks Act requires the Government to produce any written statements by a
 9 Government witness relating to the subject matter of any direct testimony by that witness. 18
 10 U.S.C. § 3500(b). The Jencks Act defines a statement as "a written statement made by said
 11 witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). The
 12 Defendant must submit a proper request to the district court for the Government to produce the
 13 Jencks statements. 18 U.S.C. § 3500(b); *United States v. Burke*, 506 F.2d 1165, 1167-1168 (9th
 14 Cir. 1974). A district court's denial of a motion to produce a witness' statement pursuant to the
 15 Jencks Act is generally reviewed for an abuse of discretion. *United States v. Cowley*, 720 F.2d
 16 1037, 1040 n. 1 (9th Cir. 1983).

17 The Government maintained that the Jencks Act did not apply because the documentation
 18 sought by the Defendant is not (and has never been) in the possession of the United States. The
 19 Court agreed with the Government, and determined that no Jencks violation had occurred. The
 20 one decision that squarely considered the application of the Jencks Act to documents in the
 21 possession of a foreign government ruled the Act inapplicable. *United States v. Friedman*, 593
 22 F.2d 109, 120 (9th Cir.1979). In *Friedman*, the Ninth Circuit held that the Jencks Act did not
 23 require production of a defendant's diary because the United States did not have "possession or
 24 control" of the diary where the Chilean government seized the diary and retained possession of
 25 it. *Id.* at 119-120. Even in the course of a joint investigation undertaken by the United States
 26 and foreign law enforcement officials, the most the Jencks Act requires of United States officials
 27 is a good-faith effort to obtain the statements of prosecution witnesses in the possession of the
 28 foreign government. See *United States v. Paternina-Vergara*, 749 F.2d 993, 998 (2d Cir. 1984).

1 The Court took testimony of Assistant Legal Attache Alisa Villa, a Special Agent with the FBI,
 2 who was located at the Embassy in Caracas, Venezuela. Agent Villa testified that she attempted
 3 to obtain reports of the Venezuelan investigation both in writing and by telephone. The requests
 4 were denied. At trial, CICPC Officer Cordero testified that no reports were in fact ever written.
 5 Accordingly, the Court found that a good faith attempt was made by the Government to obtain
 6 Jencks Act material. Since the Government did not violate the Jencks Act, it was not necessary
 7 to strike the testimony of the Venezuelan law enforcement agents on that basis.

8 2. CICPC Officers' Testimony Concerning Venezuelan Cell Phone Records

9 Defendant takes separate issue with certain testimony elicited by the Venezuelan officers
 10 pertaining to cell phone records discovered during their investigation. Specifically, CICPC
 11 Officer Cordero testified that, in the course of her investigation, she studied Defendant and Lee's
 12 cell phone records for the time period of October 2006 to January 2007. Officer Cordero
 13 discovered that Defendant's cell phone was used in numerous locations around Venezuela
 14 during that time period, and that Defendant and Lee were in frequent contact with one another
 15 daily, at all times of the day and night. Officer Cordero also testified to the number of cell phone
 16 calls made from Defendant to Lee's cell phone in Venezuela. Defendant objected to the
 17 introduction of this testimony as impermissible hearsay.¹

18 The Court allowed this testimony solely for the non-hearsay purpose of providing the jury
 19 with the context of the Venezuelan agents' decision to alter their kidnaping investigation of the
 20 Defendant from one of victim to one of possible perpetrator. Officer Cordero was allowed to
 21 explain what actions she took as a result of reviewing the cell phone records. A jury instruction
 22 was given on this issue. The jury was instructed that the officers' testimony regarding the cell
 23 phone records was not being offered for the truth of the matter asserted, rather its exclusive

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 25 ¹ Defendant now argues that the testimony also violated the "Best Evidence" rule and should
 26 have been excluded on that ground. Defendant's "best evidence" objection, while valid, was not timely
 27 raised and therefore waived. Defendant neglected to state the objection during trial, and instead raises it
 28 for the first time in Defendant's written motion (well after the introduction of the evidence). It is well
 settled that an untimely objection is treated as no objection at all. *See United States v. Olano*, 507 U.S.
 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (a constitutional right "may be forfeited in criminal as
 well as civil cases by the failure to make timely assertion of the right before a tribunal having
 jurisdiction to determine it") (internal quotation and citation omitted).

1 purpose was to explain the conduct taken, in other words, the effect on the officers' 2 investigation. The Court's instruction, therefore, appropriately confined the jury's consideration 3 of the cell-phone testimony to non-hearsay purposes.

4 Similarly, Officer Cordero explained that she interviewed Defendant's business partner, 5 Estefano Renzo Alvarado, after reviewing the cell phone records, also as part of her 6 investigation. This testimony was allowed to again show the effect on the investigation. The 7 Court, however, did not allow specific testimony by Officer Cordero regarding what was said 8 during the interview with Estefano Renzo Alvarado as such statements would clearly be hearsay 9 in nature. The conduct testimony was relevant to show the officer's state of mind as to the 10 changing nature of her investigation and that, in her mind, there had not been a kidnaping. Such 11 information was also necessarily conveyed to the United States Embassy agents and the FBI who 12 could not themselves conduct investigations in Venezuela, a foreign country.² The Court should 13 not exclude legitimate non-hearsay testimony regarding conduct when, as is the case here, there 14 are independent investigations conducted simultaneously by two separate countries.

15 The Sixth Amendment does not bar out-of-court statements when the statement is not 16 offered to prove the truth of the matter asserted; thus, the Sixth Amendment poses no bar to the 17 admission of non-hearsay statements. *See Crawford v. Washington*, 541 U.S. 36, 60 n. 9, 124 18 S.Ct. 1354, 158 L.Ed.2d 177 (2004). When out-of-court statements are not offered to prove the 19 truth of the matter asserted, the Confrontation Clause is satisfied if the defendant had the 20 opportunity to cross-examine the person repeating the out-of-court statement. *See Tennessee v.* 21 *Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985); *see also United States v.* 22 *James*, 487 F.3d 518, 525 (7th Cir. 2007) (the admission of an FBI agent's testimony about what 23 an informant had told him concerning the informant's prior drug dealings with a defendant who 24 was being prosecuted for a drug offense did not violate the Confrontation Clause, since the

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26 ² The Court does not construe the sharing of this information to mean that the Venezuelan 27 authorities were working for the United States Embassy or the FBI. Originally, Defendant was regarded 28 as a kidnap victim by the United States Authorities when they undertook their independent investigation. If the United States Government was not informed of Defendant's status by the Venezuelan authorities, the United States would not be able to help the purported victim or that victim's family.

1 testimony was only admitted for the non-hearsay purpose of providing context for the
2 government's decision to work with the informant, and the defendant had the opportunity to
3 cross-examine the agent.) In this case, CICPC Officer Cordero, who reviewed the cell phone
4 records and spoke with Estefano Renzo Alvarado, testified and the defense had the opportunity
5 to cross-examine the officer regarding her inquiry.

6 3. Venezuelan Cell Phone Records used for Impeachment

7 Defendant also moved for a mistrial based on the Government's failure to disclose certain
8 evidence that was used for impeachment of the Defendant. Specifically, Defendant objected to
9 the Government's use of Venezuelan cell phone records used during the Defendant's cross-
10 examination. Defendant argued that the records should have been disclosed prior to trial
11 pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and
12 Fed.R.Crim.P. 16. The Court denied the mistrial finding that the documents were neither *Brady*
13 nor Rule 16 material.

14 Instead, the Court ruled that the records were admissible for impeachment purposes under
15 Fed.R.Evid. 607. A hearing outside the presence of the jury was held to satisfy the Court that
16 the documents were sufficiently trustworthy. In addition, defense counsel was given time to
17 review the documents prior to their use by the defense. The cell phone records were obtained by
18 FBI Special Agent Eaton who testified that he obtained the records directly from the Venezuelan
19 phone company and the chain of custody was uninterrupted. Accordingly, the Court finds that
20 the method used to obtain the records was sufficient to satisfy the trustworthiness of the cell
21 phone records for impeachment purposes.³

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27 ³ The jury was instructed that the phone records used during the Defendant's cross-examination
28 were to be considered for impeachment purposes only. After that instruction, the defense offered the cell
phone records into evidence as substantive evidence and the jury was then informed as to the change in
the nature of the evidence.

1 **IV. CONCLUSION**
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3 For the reasons set forth above, Defendant's motion for a judgment of acquittal pursuant
4 to Rule 29 and Defendant's motions for mistrial are **DENIED**.

5 **IT IS SO ORDERED.**
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7 DATED: October 30, 2007
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10 M. James Lorenz
11 United States District Court Judge
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